Office - Supreme Court, U.S.
FILED
MAY 10 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1920, 81-1921, 81-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION, *et al.*,
Respondents.

NORTHERN NATURAL GAS COMPANY, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION, *et al.*,
Respondents.

CITIES SERVICE GAS COMPANY, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to
The United States Court of Appeals
For the Tenth Circuit

MEMORANDUM OF RESPONDENT PHILLIPS PETROLEUM COMPANY IN SUPPORT OF PETITIONS FOR CERTIORARI

KENNETH HEADY
C.J. ROBERTS
DON L. JEMISON
Phillips Petroleum Company
Bartlesville, Oklahoma 74004

WILLIAM H. ALLEN*
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044

Attorneys for Respondent Phillips Petroleum Company

May 1982

*Counsel of Record

QUESTIONS PRESENTED

Insofar as petitioners present the following questions, respondent Phillips Petroleum Company* joins in asking for review:

1. Whether Section 11 of the Helium Act, which in terms merely exempts helium from rate regulation under the Natural Gas Act, has an additional consequence: that of depriving of their defense of payment purchasers of natural gas streams containing helium under contracts conveying the entire stream, including the helium, when the producers of the natural gas claim an entitlement to special compensation for the helium in addition to the price paid under the purchase contracts.

---

*In compliance with this Court's Rule 28.1, a list of corporations in which Phillips Petroleum Company holds less than a 100% interest follows: Acurex Corporation; Aero Oil Company; Alyeska Pipeline Service Company; Arctic LNG Transportation Company; Bonny LNG Limited; Bruin Carbon Dioxide Sales Corporation; Calatrava Empress Para la Industria, Petroquimica, S.A.; Canada Western Cordage Co., Ltd.; Canyon Reef Carriers Inc.; Chisholm Pipeline Company; Cochin Refineries Ltd.; Colonial Pipeline Company; Compagnie Francaise du Carbon Black S.A.; Dixie Pipeline Company; Drisco S.A. de C.V.; Everglades Pipeline Company; Explorer Pipeline Company; Insurance and Reinsurance Brokers, Ltd.; Iranian Marine International Oil Company; Kaw Pipe Line Company; Kensi LNG Corporation; LeeFac, Inc.; Negromex S.A.; Newmont Mining Corporation; Nordisk Philblack AB; Norland GmbH; Norpipe A/S; Norpipe Petroleum U.K. Ltd.; Norsea Gas A/S; Norsea Gas GmbH; Norsea Pipeline Ltd.; Papago Chemicals, Inc.; Petrochim; Phillips Carbon Black Limited; Phillips Carbon Black Company (Pty.) Ltd.; Phillips Carbon Black Italiana S.p.A.;

2. Whether any special compensation to such natural gas producers should be determined according to state law, as this Court ruled in *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125 (1974), or according to federal common law as the court below has ruled.

Phillips Gas Supply Corporation; Phillips Imperial Petroleum Limited; Phillips Pacific Chemical Company; Phillips Petroleum Singapore Chemicals (Private) Limited; Philmac Oils Limited; Plasticos Vanguardis S.A.; Polar LNG Shipping Corporation; Polyolefins; Quimica Veneco C.A.(b); Renolit Fertighaus GmbH; Salk Institute Biotechnology Industrial Assoc. Inc.; Seadock, Inc.; Seaway Pipeline Inc.; Sevalco (Holdings) Limited; SPODCO Ltd.; Venezoil, C.A.; Texas Offshore Port, Inc.; Transatlantic Reinsurance; Western Desert Operating Petroleum Company; White River Shale Oil Corporation.

TABLE OF CONTENTS

Page

STATEMENT 2

ARGUMENT 4

CONCLUSION 10

TABLE OF AUTHORITIES

Cases:

Ashland Oil, Inc. v. Phillips Petroleum Co.,
364 F. Supp. 6 (N.D. Okla. 1973), aff'd in part, rev'd in part, and remanded, 554 F.2d 381 (10th Cir.), *cert. denied*, 434 U.S. 921 (1977); *on remand*, 463 F. Supp. 619 (N.D. Okla. 1978), *aff'd in major part*, 607 F.2d 335 (10th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980) 2

Illinois v. City of Milwaukee,
406 U.S. 91 (1972) 8

Pan American Petroleum Corp. v. Superior Court
366 U.S. 656 (1961) 3

Phillips Petroleum Co. v. Wisconsin,
347 U.S. 672 (1954) 3, 6

Skelly Oil Co. v. Phillips Petroleum Co.,
339 U.S. 667 (1950) 3

Texaco Inc. v. Phillips Petroleum Co.,
481 F.2d 70 (10th Cir. 1973), *rev'd*,
415 U.S. 125 (1974) 2, 7-10

Touche Ross & Co. v. Redington,
442 U.S. 560 (1979) 6

Transamerica Mortgage Advisors, Inc. v. Lewis,
444 U.S. 11 (1979) 6

Page

Statutes:

Natural Gas Act, 15 U.S.C. § 717-717w 3, 8

§ 4, 15 U.S.C. § 717c 3

Helium Act of 1925, § 11, as added by Helium Act Amendments of 1960, 74 Stat. 922, 50 U.S.C. § 167i ..... 3 *passim*

Miscellaneous:

United States Supreme Court Rule 17.1(a) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 81-1920, 81-1921, 81-1922

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION, *et al.*,
Respondents.

NORTHERN NATURAL GAS COMPANY, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION, *et al.*,
Respondents.

CITIES SERVICE GAS COMPANY, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to
The United States Court of Appeals
For the Tenth Circuit

MEMORANDUM OF RESPONDENT PHILLIPS PETROLEUM COMPANY IN SUPPORT OF PETITIONS FOR CERTIORARI

Phillips Petroleum Company is a respondent in these cases. Nominally it is aligned as a party in opposition to the petitioners because it is a producer of natural gas containing helium that it has sold to them. However, like three of the petitioners, National Helium Corporation, Northern Helex Company, and Cities Service Helex,

Phillips formerly processed helium-rich natural gas to extract the helium and sold the helium to the government under a long-term contract. Therefore, in separate proceedings it is the subject of claims by certain of its vendors, like the claims of the producers here, that the contracts by which those vendors parted with title to helium and were paid for it should be ignored and they should have a share of what Phillips earned under its government contract. Phillips joins in asking that certain of the questions presented by the petitioners, restated for convenience at the outset of this memorandum, should be heard by this Court.

STATEMENT

The decisions of the court of appeals in the helium title litigation, both in the case that is the subject of these petitions and cases in which producers have sued Phillips individually, represent a deep and unwarranted incursion into an area of state sovereignty.[1]

At issue are ordinary contracts for the sale of natural gas. Except to the limited extent that the Federal Energy Regulatory Commission regulates the producer price of natural gas and the terms of sale under the Natural Gas Act, such contracts are governed by state law. *Pan*

[1]All relevant decisions of the district courts and of the court of appeals are collected in the Joint Appendix to the petitions in these three cases and in No. 81-1919. The cases involving Phillips individually are Ashland Oil, Inc. v. Phillips Petroleum Co., 364 F. Supp. 6 (N.D. Okla. 1973) (Jt. App. A468-89), *aff'd in part, rev'd in part, and remanded*, 554 F.2d 381 (10th Cir.) (en banc) (Jt. App. A429-46), *cert. denied*, 434 U.S. 921, 968 (1977); *on remand*, 463 F. Supp. 619 (N.D. Okla. 1978) (Jt. App. A390-428), *aff'd in major part*, 607 F.2d 335 (10th Cir. 1979) (Jt. App. A385-89), *cert. denied*, 446 U.S. 936 (1980); Texaco Inc. v. Phillips Petroleum Co., 481 F.2d 70 (10th Cir. 1973) (Jt. App. A501-10), *rev'd*, 415 U.S. 125 (1974) (Jt. App. A494-A500).

American Petroleum Corp. v. Superior Court, 366 U.S. 656, 661-65 (1961); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). The meaning of a natural gas sales contract, in particular, is determined according to state law. In the first of its significant decisions in this group of cases, in 1971, the court of appeals recognized this proposition. The court ruled, first, on the basis of its analysis of the law of the relevant states that the typical oil and gas lease by which the right to extract oil or gas or both is conveyed by a land owner to a lessee comprehends any helium content of the natural gas. (Jt. App. A143-53.) It then ruled that the typical contract for the sale of natural gas by a lessee-producer to a pipeline or other purchaser comprehends the sale of all the constituent elements of the natural gas, including its helium content. (*Id.* at A157-58.) The court of appeals has not departed from these wholly correct rulings in the succeeding decade.

Nevertheless, the court of appeals has held throughout the same decade that effect is not to be given to the contracts insofar as they convey the lessee-producers' helium to purchasers in exchange for money. As the technical reason for this result, the court has relied upon Section 11 of the Helium Act, as added by the Helium Act Amendments of 1960, 50 U.S.C. § 167i. It has in addition taken a very expansive view of the consequences of the fact that since the decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), sales of natural gas by producers for resale in interstate commerce are subject to the Natural Gas Act, and interstate natural gas sales contracts were designated by the Federal Power Commission to serve as rate schedules under Section 4 of the Natural Gas Act. Section 11 of the Helium Act provides that the Natural Gas Act does not apply to the sale of helium. The court of appeals has reasoned that, because natural gas sales con-

tracts are treated as rate schedules under the Natural Gas Act, which may not by Section 11 of the Helium Act Amendments cover helium, the sellers of helium-rich natural gas are free to ignore their contracts and to recover from their purchasers in quantum meruit for the helium content of the gas. (Jt. App. A158-68.)

The practical reason why Section 11 has been given such an extraordinary, far-reaching effect is the government's purchase of helium for storage pursuant to other provisions of the Helium Act Amendments of 1960. The government contracted with Phillips and the three other so-called helex companies (which are among the petitioners here) for the construction of pioneering helium extraction plants and the purchase by the government from them of a helium-nitrogen mixture to be carried by pipeline to a government storage facility for refining into pure helium as future needs might require. The price was separately negotiated with each of the companies and reflected the risks they ran in the development and use of new helium extraction technology. The court below thought that the lessee-producers of the helium should share in the helex companies' reward for taking that risk even though they took none of the risk themselves and even though they had knowingly contracted to sell and had been paid the contractual price for the helium content of their natural gas.

ARGUMENT

1. The question whether Section 11 of the Helium Act was meant by Congress to have the consequences that the court of appeals has attributed to it is an important question of federal law that has not been but should be decided by this Court.

The court of appeals has not seriously re-examined the question since it first gave its own answer in 1971. In the intervening period the court has filed three opinions on the merits of the helium litigation, two in a case involving Phillips and one of its vendors and the third its most recent opinion in this case. It has never engaged in a reasoned reconsideration of its 1971 decision that Section 11 opened the way for some natural gas producers to share in the rewards of enterprises to which they supplied the raw material and nothing more and even though they were paid for the raw material the price that they bargained for.[2]

The court's theory was flawed at the outset, and the flaws in it have been demonstrated many times over the years. The theory rests on a strained analogy to the case of, say, a railroad that offers warehousing services to shippers at no addition to its tariff rates. (Jt. App. A163.) Helium, according to the court below, is the unregulated commodity, comparable to the warehousing services, that cannot be included in a sale at a regulated rate. It has been pointed out over the years how much in the real world this line of reasoning ignores. It ignores the facts:

(1) that the natural gas producers and their purchasers entered into their contracts freely, many of them before

---

[2]This litigation is sometimes known as *Grounds* and sometimes as the *Consolidated Helium Cases.* In its first Ashland-Phillips opinion in 1977, the court of appeals, which was sitting en banc and could perfectly well have reviewed the panel decision of 1971 in this case, said merely that "[t]he controlling rules were set in the *Grounds* opinion [of 1971], en banc consideration was denied, and the Supreme Court denied certiorari, 404 U.S. 951 . . . . We decline to reconsider *Grounds.*" (Jt. App. A437; *see also id.* at A445.) In the second Ashland-Phillips opinion, the underlying issue of the meaning of § 11 of the Helium Act was not even adverted to. Similarly in its most recent opinion in this case the court did not mention the underlying statutory issue.

the decision in *Phillips v. Wisconsin* and even more before Section 11 was enacted in 1960;

(2) that, if in those contracts no special value was assigned to the helium, that was a matter of free bargaining in the market as it then stood, not a forbidden concession by the producers, like free warehousing;

(3) that some of the contracts are explicit in permitting the seller to extract helium but waiving any claim to it if the extraction privilege is not exercised, and even under these contracts the court has released the seller from his bargain;[3]

(4) that many of the contracts are wholly unfrustrated, never having been affected in the slightest by Natural Gas Act rate regulation because the prices were at or below the reasonable maximum rates determined by the natural gas regulatory agency; and

(5) that, in any event, the Federal Power Commission (now the Federal Energy Regulatory Commission) did not take any steps in its regulation of natural gas calculated to prevent the parties from bargaining freely over the prices of the helium content of natural gas.

The court below has never taken account of how far its decision thus clashes with the facts. On the law, the court of appeals never considered the inconsistency of its straining to read Section 11 as affording to the natural gas producers a right of action they would not have had in the absence of the section with this Court's increasing skepticism over the past decade of claims that federal regulatory statutes should be construed as conferring by implication rights of actions on private individuals and companies. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

---

[3] *See* Pet., No. 81-1920, p. 13.

The question posed by the court of appeals' construction of Section 11 clearly warrants this Court's review at this time.

2. Having abrogated the parties' contracts, the court of appeals has substituted an elaborate edifice of federal law to govern the rights of the sellers to compensation for helium. Its action is contrary to a decision of this Court, squarely in point and made in another of the helium title cases.

The case involved a claim of a natural gas producer, Texaco, against Phillips for compensation for helium. The complaint was filed in a federal court even though both parties were Delaware corporations. The district court dismissed for lack of diversity jurisdiction. The court of appeals held that the district court had jurisdiction because the court of appeals, in the original *Grounds* opinion, had created a federal cause of action for the reasonable value of helium and the case therefore arose under federal law. *Texaco Inc. v. Phillips Petroleum Co.*, 481 F.2d 70 (10th Cir. 1973) (Jt. App. A501-10).

This Court reversed summarily, on the certiorari papers and without bothering to hear argument. *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125 (1974). The Court held that, even if one assumed the correctness of the effect the court of appeals gave to Section 11 of the Helium Act and the Natural Gas Act (which was not at issue), the court had not created a federal cause of action but had merely opened the way for the assertion of a quantum meruit claim governed by state law. The Court said that "[t]he *Grounds* case cannot properly be read as creating a federal cause of action, deriving from the Natural Gas Act and § 11 of the Helium Conservation Act, for the recovery of the reasonable value of helium contained in natural gas sold at rates sanctioned by the

Federal Power Commission." 415 U.S. at 128. It said also that "Texaco's suit for the reasonable value of the helium is, in effect, an action in *quantum meruit,* whose source is state law and not federal law." *Id.* at 129.

Moreover, if the Court had thought that the case was to be determined according to federal common law, it would have decided the case differently because it had recently held in *Illinois v. City of Milwaukee,* 406 U.S. 91, 100 (1972), that "§ 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin."

The court below has not been deterred by this Court's ruling in the *Texaco* case. In both this proceeding and the separate Ashland-Phillips litigation, the court of appeals has fashioned substantive rules for determining the value of helium contained in natural gas that have nothing to do with the laws of the states concerning recovery upon a contract or in quantum meruit. Indeed, as petitioners point out, especially the petitioners Panhandle Eastern and National Helium in No. 81-1920, the least consideration of the law of any of the states whose law might reasonably govern would have disclosed that, if there is a contract between the parties by which they have agreed on the value of the thing conveyed, there can be no recovery for some different "fair value" of the thing. (Pet., No. 81-1920, pp. 12-13.) Moreover, in determining the measure of a quantum meruit recovery, the court has insisted upon the use of a so-called work-back method of valuation without inquiry into whether such a method is consonant with the law of any of the states whose laws pertain to these proceedings.

In the decision of which review is now sought the court abandoned all pretense that it was doing anything other

than applying federal law where this Court had ruled that state law governs. The court of appeals declared that its decision in the Ashland-Phillips litigation in which it detailed how the work-back method was to be applied was the "law of the case" determinative of the rights of the many score parties to this separate litigation who were strangers to the Ashland-Phillips litigation. (Jt. App. A7, A13.) That is an extraordinary enough extension of the law of the case doctrine, which the petitioners properly question here as an instance in which, within the meaning of this Court's Rule 17.1(a), a court of appeals "has so far departed from the accepted and usual course of judicial proceeding . . . as to call for an exercise of this Court's power of supervision." Beyond that question, however, the invocation of Ashland-Phillips as the "law of the case" for *Grounds* demonstrates unmistakably that the court of appeals means, despite *Texaco,* to have federal law of its devising applied to the helium litigation.

The Ashland-Phillips transaction concerned helium contained in natural gas produced in Texas. This litigation concerns helium contained in natural gas produced in Kansas and Oklahoma as well as Texas. There could be no assurance that the governing law would be the same in the two cases if state law were properly applied. Yet the court of appeals has ruled that the valuation method it prescribed in the case involving solely two Texas contracts governs the valuation of helium in a case in which contracts from three states are involved. It can only mean that that method has its source in a body of law that is not the law of any state.

The departure from this Court's ruling in the *Texaco* case could not be plainer. Moreover, as petitioners show, there seems to be no justification on the basis of this Court's decisions for the application of federal common

law here, even assuming that *Texaco* left the question open. This Court should review the issue.

CONCLUSION

The petitions should be granted at least insofar as they present the questions stated at the outset of this memorandum.

Respectfully submitted,

WILLIAM H. ALLEN

Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5420

KENNETH HEADY
C.J. ROBERTS
DON L. JEMISON

Phillips Petroleum Company
Bartlesville, Oklahoma 74004

Attorneys for Respondent
Phillips Petroleum Company

May 1982